Office - Supreme Court, U.S.
FILED
SEP 11 1957
JOHN T. FEY, Clerk

No. 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

STANDARD OIL COMPANY,
Respondent.

BRIEF IN BEHALF OF NATIONAL CONGRESS OF PETROLEUM RETAILERS, INC., AND RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., *AMICI CURIAE*

APPELL, AUSTIN & GAY,
30 Rockefeller Plaza,
New York 20, N. Y.

Attorneys for National Congress of Petroleum Retailers, Inc., and Retail Gasoline Dealers Association of Michigan, Inc.

CYRUS AUSTIN,

INDEX

PAGE

Interest of *Amici Curiae* 1

Questions Presented 2

The issues 5

The Facts in Detroit 7

The impact of price discrimination on retail gasoline competition 7

Why the major oil companies refuse to sell to the rank and file of their retailer customers in tank car quantities at tank car prices 9

No price competition among major oil companies 13

The Factual Background of Paragraph 2 of the Commission's Order 15

Standard's retailer customers cannot purchase their gasoline from wholesalers 15

Argument 18

I. The Construction of the Meeting Competition Proviso Adopted by the Court Below is Contrary to the Intent of Congress and in Conflict with the Prior Decisions of this Court 18

Legislative history 19

The Commission's construction of the "good faith" clause is in accord with the prior decisions of this Court and with recent decisions of the Court below 24

A purpose to retain customers is not the sole test of whether the seller's lower price is made "in good faith" 26

PAGE

II. This Court Presumably Was of the Opinion that the Record Herein Contained Substantial Evidence Indicating that Standard's Lower Price Was Not Made "In Good Faith" Within the Meaning of Section 2(b); Otherwise the Court Need Not Have Remanded for Findings on This Question. The Commission's Findings of *Fact* on Such Remand Are Conclusive 2

III. Standard's Objections to Paragraph 2 of the Commission's Order are Without Merit. Retention of That Paragraph or Its Equivalent is Essential to the Effectiveness of the Order 3

Contentions made by jobbers 3

Conclusion 3

Appendix 3

Table of Cases

Federal Trade Comm. v. Cement Institute, 333 U. S. 683 2

Federal Trade Comm. v. Curtis Publishing Co., 260 U. S. 568 3

Federal Trade Comm. v. Morton Salt Co., 334 U. S. 37 ..... 20, 2

Federal Trade Comm. v. Staley Mfg. Co., 324 U. S. 746 2

Kidder Oil Co. v. F.T.C., 117 F. 2d 892 (7th Cir.) ... 3

Matter of Edelmann & Co., CCH 1955 Trade Reports Sec. 25,445; affd. 239 F. 2d 152 (7th Cir. 1956) .. 2

Matter of Niehoff & Co., CCH 1955 Trade Reports Sec. 25,467; mod. and affd. 241 F. 2d 37 (7th Cir. 1957) 25, 2

Matter of Whitaker Cable Corp., CCH 1955 Trade Reports Sec. 25,443; affd. 239 F. 2d 253 (7th Cir. 1956); cert. den. 4/22/57 2

Other Authorities.

	PAGE
80 Congressional Record 3119	22
80 Congressional Record 9418	21
Final Report on the Chain Store Investigation Sen. Doc. No. 4, 74th Cong., 1st Sess.	21
Hearings before Special Committee on Investigation of American Retail Federation, 74th Cong., 1st Sess. (1935)	21
H. R. Report 2951, 74th Cong., 2nd Sess. (1936)	21
Investigation of Trade Practices of Big Scale Retail and Wholesale Buying and Selling Organizations, 74th Cong., 1st and 2d Sess. (1935-1936)	21

No. 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

STANDARD OIL COMPANY,

Respondent.

BRIEF IN BEHALF OF NATIONAL CONGRESS OF PETROLEUM RETAILERS, INC., AND RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., *AMICI CURIAE*

Interest of *Amici Curiae*

National Congress of Petroleum Retailers, Inc. is a trade congress of State and local associations of retail gasoline dealers, national in scope, formed for the purpose of fostering and promoting the interests and welfare of the 275,000 petroleum retailers in the United States. It is the only trade association of retail dealers in petroleum products having a nationwide representation. Organized as a non-profit membership corporation under the laws of the State of Michigan, its membership is comprised of 57 state and local associations located in 36 states and the District of Columbia.*

* A list of the affiliated gasoline retailer associations comprising the membership of National Congress of Petroleum Retailers, Inc., is set forth as an appendix to this brief.

Retail Gasoline Dealers Association of Michigan, Inc., is a non-profit membership corporation serving the interests of the retail gasoline dealers of that State. It is a member of National Congress of Petroleum Retailers, Inc. The Association has 2,785 members in the State of Michigan and more than 1500 members in the Detroit metropolitan area, where this case arose.

The retail gasoline dealers of Detroit and of the nation have a direct and vital interest in the outcome of this proceeding. This record shows that Standard Oil Company and other major oil companies have long engaged in the practice, in Detroit and other metropolitan areas, of selling their branded gasolines to a few large volume purchasers, classified by them as "jobbers" but reselling in whole or in part at retail, at a price substantially lower than the price which they charge for the same gasolines to the many hundreds of smaller retail dealers whom they supply in the same market areas and who must compete with the large volume buyers. The Commission has found that this price discrimination has had and may have the effect of injuring, destroying and preventing competition with the favored "jobbers" in the retail resale of said gasolines. The purpose of the cease and desist order issued by the Commission herein, which the court below has set aside, is to protect the retail gasoline dealers of Detroit and other areas served by Standard from the injurious effects of such price discrimination. Said order, if reinstated by this Court, presumably will be respected and complied with not only by Standard but by the other major oil companies as well. The dealers represented by these Associations, therefore, are directly concerned with the affirmance and enforcement of the Commission's order, and are, in fact, real parties in interest in this proceeding.

Questions Presented

As viewed by the retail gasoline dealers, the assertion of the "meeting competition" defense in this case is an

effort by Standard Oil Company to justify and obtain judicial sanction of a discriminatory pricing practice long used by major oil companies, whereby a quantity price differential based on the customer's annual volume is granted to a few large gasoline retailers in metropolitan areas, and to wholesalers reselling in part at retail, but is denied to the great number of smaller retailers who must compete in the resale of the same branded gasoline with the large volume purchasers.

The major oil companies who sell their gasolines at two prices in the same marketing area quote these prices as a "tank car price" and a "tank wagon price". The tank car price, however, is not offered to any dealer who wishes and is able to buy and take delivery in tank car quantities (R. 146-7, 552-8, 2088-9, 1256). This lower price is available only to those dealers whom these oil companies choose to classify as "jobbers" (Answer, R. 12-14). It appears that by industry definition a gasoline jobber is any dealer, whether wholesaler or retailer or both, who buys in tank carloads, has bulk storage, and delivers to his own or other service stations (R. 934, 5096). The major oil companies, however, do not permit the rank and file of their retailer customers in metropolitan areas to qualify as jobbers even under this industry definition. They impose an arbitrary volume requirement of their own for jobber recognition, and this requirement (the purchase of 1,000,000 to 2,000,000 gallons or more of gasoline annually) is made so high that only the largest volume purchasers can qualify (R. 119, 1891).*

---

* Mr. Raupagh, manager of Standard's Detroit division, testified:

"Q. What must the character of the business be? A. Well, he must have a bulk plant; he should have some established business; he should be able to purchase from a million to two million gallons a year.

"Q. Why do you make that volume requirement? A. I don't know of any particular reason excepting that for an in-

(*Footnote continued on following page*)

It is thus evident that the so-called "tank car price" actually is neither a tank car price nor a functional price, but is nothing more nor less than a quantity discount based on an arbitrarily high annual volume requirement. It is not truly a tank car price since it is not available to any customer who wishes to buy and is able to take delivery in tank carloads. It is not a functional price because the large customers classified as jobbers are so classified without regard to whether they resell at wholesale, or in part or in whole at retail. Any customer buying the required gallonage could qualify as a jobber and get the tank car price.

The Commission found that Standard's allowance of this quantity price to the four "jobbers" as retailers gave them a substantial competitive advantage over its direct retailer customers paying the higher price, which has resulted and may result in serious injury to competition (R. 5372-4). The Commission also found that the lower price to the jobbers was not justified by any cost savings to Standard in serving them. These findings are not now in disute.

Stripped of its non-essentials, then, this case boils down to the simple matter of one chain retailer and three wholesaler-retailers, who, because of the large volume of their purchases, were permitted to buy as "jobbers" at a price

---

(*Footnote continued from preceding page*)

dividual or a concern to be a jobber there must be some volume involved, and that's what we consider as a proper volume.

"Q. Does the jobber, to you, simply mean somebody who buys in certain quantities? A. Who buys in certain quantities and performs a function of a jobber.

"What is your understanding—what is the function of a jobber? A. First, that he buy in sufficient quantity.

"Q. Is it necessary that he resell to other dealers? A. No."

As to the requirements for jobber qualification other than volume (storage and delivery facilities and good credit), tank storage and trucking are easily obtainable (R. 984, 395), and there is no indication that Standard was willing to sell gasoline in carload lots to smaller purchasers even for cash.

substantially lower than the price charged their smaller retailer competitors. The question here presented would be the same if Standard's practice had been to make deliveries to the large volume buyers directly to their service station tanks at the lower price.

The Issues

1. A single substantive issue remains for decision in this case. That issue is whether, upon the findings of fact of the Commission and other undisputed facts of record, Standard has established the defense that its discriminatory price to the four jobbers, on gasoline resold by them at retail, was made, in fact and *in good faith*, to meet the equally low prices of competitors, within the meaning of Section 2(b) of the Clayton Act.

As related to the pricing practice above described, this issue may be variously restated as follows:

May a quantity price or discount, regularly granted to a few large volume purchasers by a major supplier of a commodity, and otherwise unlawfully discriminatory, be justified under the "good faith" proviso by showing that other major suppliers of such commodity regularly grant the same differential or discount to purchasers of like volume?

May adherence to a discriminatory pricing practice continuously employed by the dominant suppliers in an industry be justified under the "good faith" clause on the ground that it is an "industry practice" and that a particular supplier not adhering to it might lose customers?

Was it the intent of Congress, in inserting the "good faith" limitation in Section 2(b), to permit the constant allowance of unearned price differentials to large volume buyers by dominant suppliers or as an industry practice?

The Commission has answered these questions in the negative. The Court of Appeals refused to meet this issue, but instead substituted its own findings of fact for those of the Commission. In so doing it ignored the numerous admissions made by Standard in its answer to the complaint, in the testimony of its witnesses, and in its prior briefs that both its higher and its lower prices were fixed in accordance with a defined pricing policy based on customer classification. In fact, Standard's principal reliance at the trial, as to meeting competition, was upon its adherence to the same criteria for jobber classification and the same tank car—tank wagon price differential which was employed by its major competitors.

Referring to the charges made in the meeting competition defense by the Robinson-Patman Act, the Court of Appeals concluded:

> "It would thus appear that a 'good faith' defense available under the Clayton Act would still be available under the amended act. If petitioner's pricing policy was lawful prior to the amendment the same policy was lawful afterward."

The court below thus has held that Congress, in enacting the Robinson-Patman Act, failed in its purpose to strengthen Section 2 of the Clayton Act by closing or at least narrowing the loopholes provided by the old defenses. As will hereinafter be pointed out, this Congressional purpose abundantly appears from the legislative history of the Act, and has been recognized by this Court in prior decisions.

The basic question, therefore, is as to the proper construction to be given the "good faith"-clause of Section 2(b), in the situation here presented.

The Facts in Detroit

We believe this brief will best serve the Court by presenting the factual background necessary to an understanding of Standard's price discriminations in Detroit, and of the dual pricing system there employed by most of the major oil companies.

The writer of this brief has been connected with this case since its inception in 1940. As trial attorney for the Federal Trade Commission he prepared the complaint, tried the case, briefed and argued it before the Commission. He has represented the retail gasoline dealers at all stages of the case before the Commission and in the courts since 1946. He is, therefore, thoroughly conversant with the record herein in all its aspects.

The impact of price discrimination on retail gasoline competition

There is no retail business in which competition is more immediately affected by discriminatory pricing practices of suppliers than the retail gasoline business. There are several reasons why this is true.

First, the gasoline trade is on wheels. In a large metropolitan area like the Detroit area the average driver of an automobile can without inconvenience buy gasoline at any one of hundreds of service stations throughout a territory of many square miles through which he drives regularly. At the time this case was tried there were 3700 or 3800 retail gasoline service stations in metropolitan Detroit (R. 298), of which some 450 stations (including those supplied by wholesalers) dispensed Standard's gasoline from Red Crown pumps (R. 5057-60). Price is the most potent factor in gaining and regaining customers at a service station (R. 338-9, 5113). An automobile owner can and will transfer his business from

one station to another when he sees a sign advertising a cut of a cent a gallon or even less in the brand of his choice or another brand of equal public acceptance. For this reason, competition with a retail gasoline station is not limited to nearby stations, and a competitive advantage obtained by one station, particularly where located on a main artery of traffic, will be felt by other stations many miles away.

A second reason for the sensitivity of competition between retail gasoline dealers is that the volume of retail gasoline business is practically constant, except for seasonal variations, depending almost entirely upon the number of automobiles in use in the area from year to year (R. 153, 5372). There is no such thing as "new" gasoline business to be obtained by advertising salesmanship or price cutting. This means that when a gasoline retailer obtains a wholesale price advantage over other dealers and uses it to cut his retail price, the business attracted will be taken from other dealers to their immediate loss (R. 5114-5).

In a highly competitive area like Detroit the dealer's margin between the price he pays and the price at which he sells is very narrow (R. 5372). At the time this case was tried the margin in Detroit between the posted tank wagon price of the major oil companies and the prevailing retail selling price was only 3.3 cents a gallon (Comm. Ex. 3, R. 4715). A survey of retail gasoline marketing costs in Detroit made in 1938 by Herbert F. Taggart, Professor of Accounting at the University of Michigan, showed that the average cost of selling gasoline at retail service stations was 4.8 cents a gallon, and that the average cost of sale by the most efficient 25% of the stations was 3.5 cents a gallon (R. 674, 4748, Comm. Ex. 76). This explains why most retail dealers paying the tank wagon price cannot further reduce their narrow selling margin to obtain additional volume and why their ability to survive is seriously endangered when their customers are diverted to the

stations of other dealers who are enabled to cut their price by reason of being permitted to buy in tank car quantities at a differential greater than their cost of distribution (R. 323-4).

Standard's tank car price to the four favored dealers for its Red Crown gasoline which they resold at retail was 1½ cents a gallon below the tank wagon price charged other retailers. This differential gave the tank car buyers a net price advantage over their competitors of something more than a cent a gallon. (Citrin-Kolb was able to resell to one customer at a cent below tank wagon price (R. 1878-9); and Ned's Auto Supply Company abandoned employing contract haulers to transport its gasoline to its service stations at .45 cents a gallon in favor of using its own trucks, which presumably cost less (R. 1825.) This meant that the four tank car buyers had a retail operating margin about 30 per cent greater than the margin available to other retailers at prevailing prices, which, of course, constituted an enormous competitive advantage.

Why the major oil companies refuse to sell to the rank and file of their retailer customers in tank car quantities at tank car prices

Eighty-seven percent of the total volume of gasoline sold in the Detroit area is sold by major oil companies under their own brands (R. 335). This business is established and has been built up as the business of selling gasoline direct to retail dealers by tank truck delivery to the service station. The success of this business depends upon maintaining the volume of gasoline sold by that method of tank wagon prices. Only about 18 percent of the gasoline sold by Standard under its brands in the Detroit area in 1940 was sold to tank car buyers (Res. Ex. 58, R. 4879).

Until 1936 the major oil companies operated their own retail service stations in the Detroit area, selling direct to the public. They then acquired, and have continued to

acquire, many valuable and strategically located service station properties. In 1941 Standard owned about 200 such properties in Detroit, and nearly 80 percent of its tank wagon sales were to lessees of these properties (Comm. Ex. 119, R. 4783). Gasoline service station properties are not readily converted to other use since they are constructed with underground storage tanks, driveways, pumps and fixtures suitable only for dispensing gasoline.

Standard maintains six bulk plants in the City of Detroit for the purpose of supplying its tank wagon retailer customers (R. 108). Tank car sales are not made from its bulk plants, but from its marine terminal. Standard owns and operates a fleet of tank trucks in which the gasoline is delivered from its bulk plants directly to retail service station tanks. Standard also owns an office building in Detroit, and employs over 350 persons in the operation of its business of distributing and selling to retailers (R. 184).

Standard makes a greater profit per gallon on tank wagon sales than on tank car sales. This follows from the Commission's finding that its tank car differential is not justified by differences in cost of sale and delivery. Tank car sales are made on credit and a cash discount of 1% for payment within ten days is allowed, whereas gasoline delivered by tank wagon is sold for cash with no discount (R. 159).

The major oil companies thus have an enormous stake and investment in their business of selling gasoline by tank wagon delivery to retail service stations as above described. Obviously the business so developed would be disrupted if any service station customer or group of customers desiring to do so were permitted to arrange to take tank car delivery and purchase at the tank car price. In this situation it is to be expected that these companies would adopt a sales policy designed to prevent their

tank wagon customers from buying as jobbers or buying from jobbers. The record shows that that is in fact their policy, and that the policy is enforced.

In a number of instances retail service station operators have applied to Standard for permission to buy in tank car quantities at tank car prices, but such requests have been denied (R. 147, 552-558, 2088-9), in spite of the fact that bulk storage and hauling facilities could readily be secured by any dealer or group of dealers if permitted to purchase on a tank car basis (R. 984). There are a number of transportation companies in Detroit who make a business of hauling gasoline for hire (R. 395). Some service stations in Detroit have sufficient storage capacity to receive delivery of gasoline in 8,000 to 10,000 gallon quantities (R. 395); there is no reason why transport truck (tank car) deliveries could not be made to their tanks (R. 114). Standard even refused to permit one of its jobbers, Citrin-Kolb, to share joint storage facilities with another jobber, on the ground that it did not wish to set a precedent of allowing two or more dealers to buy in tank car lots by obtaining bulk storage (R. 1256).

The arbitrary and artificial nature of the major oil companies' Detroit annual volume requirements for tank car purchasing is further evident from the fact that the same requirement is not imposed by Standard in other areas, nor, insofar as appears, by non-major companies selling by tank car in Detroit. Of eighteen jobbers in Oklahoma supplied by Standard in 1939, only one bought over a million gallons, and eight bought less than 100,000 gallons during the year (R. 2575-6). This is less than the annual volume of the average Detroit service station.

The materiality of this annual volume requirement on the issue of "good faith" lies in the fact that it is imposed, not as a competitive measure, but as a protective measure to prevent diversion of the major oil companies' tank wagon business while at the same time meeting the

demands of the largest volume purchasers for preferential price treatment. The regular adherence to such a sales policy by the dominant suppliers in an industry is designed not to promote, but to prevent, price competition for the business of individual customers.

This case notably presents the anomalous situation of the market leader in the Detroit area insisting that it should be permitted to sell to a large chain retailer (Ned's Auto Supply Company) at discriminatory tank car prices which have been used to take away gallonage from the very retail dealers whose sales are the lifeblood of Standard's business and the majority of whom are its lessees. The Court may well ask why the major oil companies are willing to give a preferential quantity price to *any* large retailers to be used as a competitive weapon against their bread-and-butter customers.

During the period covered by this record Ned's was the only dealer in the Detroit area reselling Standard's gasoline wholly or principally at retail who was permitted to buy as a jobber. Two of Standard's witnesses testified that throughout its entire territory Standard has very few jobber customers (R. 1064, 3230). The majority of these jobbers are wholesalers, but an occasional sole retailer, such as Ned's, is permitted to qualify. It appears that the practice of other majors is the same (R. 1072, 1897, 5113).

The explanation of this practice is that it results to the advantage of the major oil companies to have a limited number of retail operators in an area like Detroit who, by being given a lower price, are enabled to cut retail prices from time to time, thereby forcing other retailers to reduce their prices or lose business. The effect is to foment price wars at the retail level and depress the retailer's margin to cost of sale or below. The tank wagon and tank car prices of the oil companies in the meantime remain the same or can be raised, thereby assuring to these refiners the greatest possible share of the price paid by the public. Unfair competition at the retail level is thus

fostered by giving an unearned advantage to a few, while price competition between major oil companies remains practically non-existent.

Prior to the spring of 1938 the retail dealer's margin in Detroit (difference between tank wagon price and prevailing service station price) was from 4¢ to 4.5¢ a gallon (Comm. Ex. 3; R. 4715). In March 1938 Standard began to sell to Ned's at tank car prices. Numerous witnesses testified that during this period Ned's was advertising discounts of from 1½¢ to 2¢ a gallon on Red Crown gasoline; that this price cutting spread and became prevalent in the Detroit market during that year, and that they lost business to Ned's (R. 5115). In the fall of 1939 the price cutting engendered by these "subsidized" jobbers reached a point where the tank wagon customers of other major companies were seriously affected. Sun Oil Company, which does not sell to jobbers in Detroit, retaliated by reducing its price to its dealers to enable them to meet competition (R. 328-9). This cut was promptly met by Standard and other majors, and the public benefited. Within six weeks the major tank wagon price was restored to its exact former level, and advertised price cutting by Ned's was stopped. The retail dealers' margin, however, became stabilized at only 3.3¢ a gallon, after having reached an even lower figure during the preceding months (Comm. Ex. 3; R. 447, 5114). This margin of 3.3¢ was below the average cost of sale of the most efficient 25 percent of Detroit service stations and far below the average selling cost of all stations, as established by the Taggart Survey (Comm. Ex. 76; R. 674, 4748).

No price competition among major oil companies

Both the tank wagon prices and the tank car prices of the major oil companies in a given marketing area are almost always the same. This is true as a matter of common knowledge and is confirmed by this record (R. 126, 129). The lower or tank car price to large buyers is not the re-

sult of a competitive reduction on a customer-to-customer basis. The record presents no instance where Standard reduced either its tank wagon price or its tank car price to any customer except in the single case of the tank wagon price reduction of ½ cent a gallon allowed Ned's from September 1936 to March 1938.*

There is some testimony that one or two of the jobbers reported to Standard that certain major oil companies had offered to sell to them in tank car quantities at less than the tank car price, or on better terms, but none of these reported "offers" was substantiated by testimony of any representative of the oil company involved.** Standard never met any such reported offer and never reduced its tank car price below the customary differential; and there is no evidence that any other major actually sold to any jobber in Detroit at below the "going" tank car price. None of these companies could lawfully have sold at a lower price to one of Standard's jobbers without lowering its price to its other jobbers; and it is evident that Standard did not regard these "offers" as bona fide. It thus appears that there was in reality no price competition for the business of any of the jobbers, and that Standard's recognition of Ned's as a jobber was only a customer reclassification in recognition of Ned's annual volume, pursuant to the established pricing policy of Standard and the other majors.

---

* As to that instance, the Commission has found that the only competitive offer which was then available to Ned's was for Fleet Wing gasoline, a non-major brand, and that Standard "could not have regarded the offer * * * as a serious competitive threat" (R. 5387). These findings are supported by testimony at R. 1809-10, 1815-16, 1866, 3098.

** It was agreed between counsel at the hearings that the word "offer" when used in the testimony on this subject would be regarded as used without legal significance and not as supporting a conclusion that any conversation or negotiation so referred to amounted to an offer in the legal sense (R. 1301-2, 1802-3).

The Factual Background of Paragraph 2 of the Commission's Order

Standard sold its branded gasolines to three wholesalers in Detroit. These wholesalers in turn resold at wholesale to about 100 retail service stations which competed at retail with Standard's 350 direct retailer customers. One of these wholesalers, Citrin-Kolb Oil Company, passed along a part of its tank car price advantage to certain of its retailer customers, thereby giving those customers a competitive advantage over the retailers buying from Standard direct. It is this situation which paragraph 2 of the Commission's order was designed to meet.

In other words, paragraph 2 of the order prohibits Standard from discriminating against its retailer customers indirectly through wholesalers, where the discrimination has the same effect on retail competition as the direct discriminations prohibited by paragraph 1. An understanding of the relationship which existed between Standard, its wholesaler customers and its retailer customers is essential to an understanding of the reasons and necessity for paragraph 2 of the order.

Standard's retailer customers cannot purchase their gasoline from wholesalers

As between Standard and its jobbers, Standard's tank wagon customers constitute a captive market. Not only are these customers not permitted to buy gasoline from Standard at the jobber price; they also are prevented through lessee relationship or by contracts from buying Standard's gasoline from wholesalers.

About 60% in number of the retail dealers purchasing gasoline from Standard in Detroit are Standard's lessees. Standard leases its 200 service station properties on the understanding that the operators will purchase their gaso-

line from Standard by tank wagon delivery at tank-wagon prices (R. 2126-4). Most leases are for one year periods (R. 107, 4702); none of these lessee stations have ever been serviced with gasoline by any other company (R. 2092).

Service station operators purchasing from Standard, but who are not its lessees, are required to enter into contracts with Standard requiring the dealer to buy from Standard all of his requirements of Standard's gasolines at tank wagon prices (R. 4713). Thus about 40% of Standard's retailer customers are prevented by contract from purchasing Standard's gasoline from any other source.

All business done by Standard with tank wagon customers in Detroit after 1936 was done under one of these leases or contracts (R. 210). The result is that Standard's tank wagon customers are not at liberty to shift all or part of their gasoline purchases to wholesalers dealing in Standard's brands, even if the wholesaler should offer them a price below Standard's tank wagon price.

The retail dealers purchasing at tank wagon prices from Standard are tied to Standard not only by leases and contracts, but by Standard's ownership of the tanks, pumps and tools used in service station operations and its control of the identification advertising used at the stations selling its gasoline. "Identification advertising" includes the Red Crown globes on the gasoline pumps, "Standard Service" signs, road maps and circulars. Such advertising is furnished by Standard to all retail service stations selling its branded gasolines, including stations supplied by wholesalers. The globes and signs are installed by Standard, remain its property, and can be removed by it from the service station at any time. They can be obtained from no other source, and without such identification the dealer would lose business (R. 157-8, 2107-8).

The major oil companies have almost equally effective means of controlling the operations and pricing policies of their wholesalers. Standard has no contracts with its wholesalers, and may refuse to sell to any of them at any time. Each of them sells only Standard's gasoline and has built up its business upon the public acceptance of Standard's brands. Standard does not sell in tank car quantities, for resale under its brand names, to jobbers or others who deal in other brands (R. 2086-7). It installs and retains ownership of the pump insignia, globes and signs at the service stations supplied by its wholesalers and can remove these insignia and signs at will (R. 157-8, 2914). It is obvious that these jobbers, in both their wholesale and their retail operations, are dependent from day to day upon Standard's good will and necessarily subject to its control.

If these wholesalers were in any true sense competitors of Standard, then Standard's exclusive dealing contracts with its non-lessee retailer customers, preventing them from buying its gasoline from wholesalers, would be unlawful under Section 3 of the Clayton Act. In no instance has a wholesaler openly reduced its price to its retail outlets even fractionally below Standard's tank wagon price, or offered such a price to a customer of Standard or of another wholesaler. If even sporadic instances of such competition had occurred in Detroit Standard would have been quick to put them in evidence. Citrin-Kolb, the largest of the wholesalers, never sold to a single customer who was formerly a direct customer of Standard (R. 1316).

ARGUMENT

I

The construction of the meeting competition proviso adopted by the Court below is contrary to the intent of Congress and in conflict with the prior decisions of this Court.

The decision of the court below appears to have been due in part to a refusal to accept the Commission's findings of fact, and in part to a misconstruction of this Court's prior opinion in this case (340 U. S. 231).

There can be no question but that Standard's allowance of its lower price to the four "jobbers" in Detroit was made pursuant to a policy of customer classification regularly followed by it and by other oil companies as an industry practice. In its answer Standard stated that after the time each of these four customers acquired bulk storage and distribution facilities "such customer is entitled to be classified as a wholesale or jobber buyer of gasoline as distinguished from a retail reseller" (R. 12); that it had a "general policy and practice of bona fidedly selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers" (R. 13); and "that said four customers are each bona fidedly qualified to be regarded and are regarded by the oil industry in Detroit as within the classification of wholesale or jobber customers" (R. 14).

In its brief filed in the Court of Appeals in 1948 Standard asserted that "Subject to Standard's right to select its customers, anyone could qualify as a Standard jobber" if he conformed to Standard's requirements for tank car purchasing. In Standard's brief filed in this Court in 1950 it is stated (p. 3) that

"Petitioner sold to all its service station customers at the same price—i. e., the tank wagon price. * * *

"Petitioner sold to all its jobber customers at the same price—i. e., the tank car price."

and (at pp. 42, 43) that "these customers all belong to a distinct class of buyers, so recognized throughout the industry", and that "petitioner sells to two classes of customers in the same area, admittedly at the going price to each of them." *

In its prior opinion in this case this Court held that the meeting competition defense under Section 2(b) extends only to a seller's lower price "made in good faith to meet a *lawful* and equally low price of a competitor" (emphasis supplied). The court below has stated that here "there is no finding, no contention and not even a suspicion but that the competing prices which petitioner met were lawful." Obviously, this is not true. The record abundantly shows that the other oil companies whose prices Standard claims to have met, including Texas, Gulf and Shell, sold their gasolines in Detroit and in other cities by the same dual pricing and distribution system used by Standard. (See, for example, R. 1072, 1897, Res. Ex. 38, R. 4864-7.) The prices of these other major oil companies to jobber-retailers, therefore, were discriminatory and *prima facie* unlawful; and this is also true of the price offered Ned's Auto Supply Company for Fleet Wing gasoline by Red Indian Oil Company (R. 3093-4). Standard offered no evidence to show that the prices which it claims to have met were lawful prices, or that it believed or had reason to believe that they were lawful prices.

Legislative history

The primary remedial objective of the Robinson-Patman amendment of the Clayton Act was the protection of the smaller independent merchants from injury to their com-

petitive position resulting from discriminatory advantages extended by sellers to chains and other large distributors who were found to have been using their mass buying power to demand and obtain preferential prices, discounts and allowances. As stated by this Court in *Federal Trade Comm.* v. *Morton Salt Co.*, 334 U. S. 37, 43:

> "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price."

In so referring to "the seller's good faith effort" we do not believe that this Court meant to imply that Section 2(b) permits a seller to give an unearned price advantage to a large buyer as a regular and continued practice wherever he can show, as he usually can, that other sellers offer the same price or discount to buyers of the same large quantities.

In summarizing the purpose of the Robinson-Patman bill, the Conference Report stated:

> "The object of the bill briefly stated is to amend Section 2 of the Clayton Act, so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them." (H. R. Rep. 2951, 74th Congress, 2nd Sess. (1936))

The Chairman of the House Conferees, in explaining the meeting competition proviso upon presentation of the Conference Report, said:

> "It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, and whether the way in which the competition was met lies within the latitude allowed by those limitations."

He pointed out further that this provision should not be construed as permitting "oppressive discriminations in violation of the obvious intent of the bill" (80 Cong. Rec. 9418).

The Robinson-Patman Act grew out of the Federal Trade Commission's chain store investigation, completed in 1934.* The Commission's report showed that many large chains were receiving discounts, allowances and other advantages greatly in excess of those granted, not only to competing retailers, but even to wholesalers. Section 2 of the Clayton Act had been found insufficient to cope with these practices. With regard to the provisos of that section, the House Judiciary Committee stated in reporting the Patman bill in 1936:

> "These provisos have so materially weakened section 2 of that Act, which this bill proposes to amend, as to render it inadequate, if not almost a nullity." (H. R. Rep. 2287, 74th Cong. 2d Sess., p. 7.)

* *Final Report on the Chain Store Investigation*, Sen. Doc. No. 4, 74th Cong., 1st Sess. See also: *Hearings before Special Committee on Investigation of American Retail Federation*, 74th Cong., 1st Sess. (1935), and *Investigation of Trade Practices of Big Scale Retail and Wholesale Buying and Selling Organizations*, 74th Cong., 1st and 2d Sess. (1935-1936).

In the Senate, Senator Logan stated:

> "The purpose of the bill is to stop up loopholes found in section 2 of the Clayton Act. Section 2 of the Clayton Act has been abated. There was a provision in it, as Senators will remember, allowing the granting of price differentials to meet competition in a particular community. That was perhaps unwise, although at the time of the passage of the Clayton Act it was well designed to remedy the evils then in existence. However, since then time has proved that there are ways to evade the Clayton Act, and therefore it is necessary to strengthen its provisions; and the bill seeks to do nothing else." (80 Cong. Rec. 3119)

While the congressional purpose to narrow the former meeting competition exception is thus clear, the court below has here held that "If petitioner's pricing policy was lawful prior to the amendment the same policy was lawful afterward."

In the *Morton Salt* case (*F.T.C.* v. *Morton Salt Co.*, 334 U. S. 37) this Court was unanimously of the opinion that a quantity pricing system such as that used by Standard runs directly contrary to the purposes of the Act. There the Morton Salt Company employed a carload discount available to all carload purchasers, and on top of that granted an allowance of 10 cents a case to customers purchasing 5,000 cases or more in a year, and an additional 5 cents a case to purchasers of 50,000 cases a year. These carload and volume discounts, like Standard's tank car price here, were offered to all purchasers buying in the required quantities, regardless of method of resale. Only the five largest retail grocery chains in the country were able to qualify for the 15 cents a case allowance. After pointing out that these allowances "were enjoyed by certain wholesalers and re-

tailers who competed with other wholesalers and retailers to whom these discounts were refused", the Court said:

> "Furthermore, in enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased the less-than-carload lots. To this end it undertook to strengthen this very phase of the old Clayton Act." (334 U. S. 49)

Mr. Justice Jackson's dissenting opinion, agreeing with the majority as to the unlawfulness of the volume discounts, states:

> "On the one hand [the Act] recognizes that the quantity discount may be utilized arbitrarily and without justification in savings effected by quantity sales, to give a discriminatory advantage to large buyers over small ones. This evil it would prohibit. * * *
>
> "It is not merely probable but I think it is almost inevitable that the further ten-cent or fifteen-cent per case differential in net price of sale between the large number of small merchants and the small number of very large merchants, accelerates the trend of the former towards extinction and of the latter towards monopoly." (334 U. S. 58, 60)

The major oil companies' allowance of a quantity price to large buyers permitted to qualify as "jobbers", without regard to the competitive level at which they resell, is typical of the discriminations which Congress sought to reach and prevent in passing the Robinson-Patman Act. Since it is clear that the primary objective of that Act was to prohibit the constant allowance of discriminatory prices and discounts to large purchasers, a provisory exemption such as that contained in Section 2(b) should, if possible, be construed consistently with that objective.

The Commission's construction of the "good faith" clause is in accord with the prior decisions of this Court and with recent decisions of the Court below

The record shows that Standard has persistently employed a dual pricing policy based upon customer classification according to definitions so framed as to permit only the largest buyers to qualify for the lower price. In every case heretofore in which an attempt has been made to justify the use of a discriminatory pricing *system* under the meeting competition proviso, the attempt has failed.

This Court first had occasion to construe and define the scope of the 2(b) proviso in *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746 (1945). The Commission's present findings are in accord with the following statements from that opinion:

> "The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination."
>
> "Respondents have never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition. Instead they have slavishly followed in the first instance a pricing policy which, in their case, resulted in systematic discriminations, * * *".

Standard here is in a less favorable position to defend its pricing system than was the Staley Company. Standard is the market leader in Detroit and cannot argue, as did Staley, that it was a newcomer to the market and forced to adopt the pricing practices of its competitors.

In *Federal Trade Commission* v. *Cement Institute* (333 U. S. 683, 725), this Court reaffirmed that Section 2(b) is not to be construed as permitting justification of the continuous use of discriminatory pricing methods. It was there stated:

"Section 2(b) permits a single company to sell one customer at a lower price than it sells to another if the price is 'made in good faith to meet an equally low price of a competitor'. But this does not mean that Sec. 2(b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others. We held to the contrary in the *Staley* case."

In three recent decisions the Federal Trade Commission has reaffirmed that "good faith" is not shown where the seller's lower prices are regularly made pursuant to an established pricing policy.

Matter of Whitaker Cable Corp., CCH 1955, Trade Reports Sec. 25,443; affd. 239 F. 2d 253 (7th Cir. 1956); cert. den. 353 U.S. 938;
Matter of Edelmann & Co., CCH 1955, Trade Reports Sec. 25,445; affd. 239 F. 2d 152 (7th Cir. 1956);
Matter of Nichoff & Co., CCH 1955, Trade Reports Sec. 25,467; mod. and affd. 241 F. 2d 37 (7th Cir. 1957).

In each of these cases the Court of Appeals upheld the Commission's denial of the meeting competition defense. In the *Whitaker* case it appeared that Whitaker used a dual pricing system similar to the system used by Standard here. Whitaker sold its automotive parts to oil and tire companies at a lower price than to automotive jobbers. Its price differential between these two classes of customers resulted primarily from the application of a rebate schedule based on total annual volume of purchases. Whitaker contended "that its pricing policies followed custom and trade practice in an attempt to meet equally low prices of competitors". The Court Appeals held that "the fact that petitioner adopted and followed the discount system employed by its competitors does not necessarily preclude

a finding of Section 2(a) violation", citing this Court's decision in the *Staley* case.

In the *Niehoff* case the Commission found "that the net prices accorded by Niehoff were a reflection of its nation-wide pricing system formulated to meet competition generally and not designed to meet any particular competitor's prices." The court sustained the Commission's conclusion that this defense was insufficient.

A purpose to retain customers is not the sole test of whether the seller's lower price is made "in good faith"

In the court below Standard asserted that this case depends on the "single proposition of law" that "price reductions to meet competitors' lower prices are in 'good faith' * * * when granted to established customers by a seller who 'was convinced' and 'had substantial reasons for believing' he would otherwise lose these accounts". Standard's position was that belief by the seller that its lower price is necessary to retain the customer is the sole test of statutory good faith, regardless of the purposes and pattern of the discrimination or the nature of the competition to be met.

This "proposition of law" is patently unsound. It is contradicted by the history and wording of the statute, and is at variance with this Court's statement of the requirements for "good faith" justification in its prior opinion in this case.

A seller will rarely, if ever, reduce his price to a particular customer, to the detriment of his other customers, except with his eye on his competitors' prices and in the belief that he might otherwise lose the customer. The words "in good faith" would be largely superfluous if they required no more than a showing of purpose to retain a customer. In any case where a preferential price is

constantly granted large buyers by a number of competing suppliers of goods of equal public acceptance one supplier could always show reason to believe that customers might be lost if the preferential price were not given.

In its prior opinion herein this Court expressly referred to retention of customers and good faith as separate requirements for 2(b) justification. At the very outset of its opinion the Court said that

> "under the Act, the lower price to the jobbers was justified if it was made *to retain each of them as a customer* and *in good faith* to meet an equally low price of a competitor" (R. 5307-8; emphasis supplied).

Many examples come to mind of situations where statutory good faith would not be established by showing that the seller "had substantial reasons for believing" that the lower of his two prices was necessary to hold the customer. Such would be the case if several sellers by agreement adopted discriminatory price differentials favoring large buyers, or where it is the practice for a number of dominant suppliers to classify chain retailers distributing to their own stores as wholesalers and grant them the wholesaler price; or where sellers discriminate between purchasers at different points by the use of fictitious basing points because it is industry practice for competitors to do the same. In any such case an individual seller departing from the established pricing plan adopted by himself and his competitors might well expect to lose customers, yet certainly such regular and continuing patterns of discrimination could not be justified on the ground of meeting competition in good faith. Justification is equally lacking here, where the major oil companies regularly sold at the same discriminatory differential to two *classes* of customers classified arbitrarily to suit their own purposes, with no price competition for customers of either class.

While the facts in this case are old, the major issue presented is as important now as it was in 1940, and per-

haps more important. Its importance, moreover, is national and not confined to Detroit. Standard's continued resistance to the enforcement of this order even on a factual basis is sufficient evidence of that importance. Affirmance of this order is needed to settle once and for all that the 2(b) proviso is not a loophole through which the objectives of the Robinson-Patman Act may be circumvented and defeated.

II

This Court presumably was of the opinion that the record herein contained substantial evidence indicating that Standard's lower price was not made "in good faith" within the meaning of Section 2(b); otherwise the Court need not have remanded for findings on this question. The Commission's findings of *fact* on such remand are conclusive.

The Commission has specifically found that Standard's lower price to at least three of the four "jobbers" was not made or continued to meet actual price offers of competitors (R. 5383-5388). It was found that the only offer open to Ned's Auto Supply Company (a chain retailer) was an offer by the distributor of Fleet Wing-gasoline, a non-major or "off" brand selling at lower prices (R. 5387); and that during the period in question no major oil company offer was available to Ned's, Wayne or Stikeman (R. 5384, 5386). The evidence fully supports these findings.*

In the absence of probative evidence that any of its major competitors offered an equally low price to its

---

* For an analysis of the testimony regarding these reported "offers", see the Exceptions to Trial Examiner's Report filed by the Commission's trial attorney (R. 5128-5134). These exceptions were not ruled upon by the Commission since at that time the Commission deemed it unnecessary to make factual findings as to the meeting of competitive prices.

"jobber" customers, Standard now has no alternative but to rely upon the general testimony of its marketing experts that it was industry practice to sell at tank car prices to anyone who purchased in the quantities in which these customers were purchasing and who otherwise qualified for tank car delivery. The Commission gave full recognition to such testimony in concluding that adherence to such an industry practice as an established pricing policy was insufficient to justify price discriminations otherwise unlawful (R. 5388).

Standard can not seriously claim that the Commission's findings of fact herein are not supported by substantial evidence. Nevertheless, it made some attempt in the court below to obscure the conclusiveness of the Commission's findings by reference to findings of the trial examiner, to excerpts from prior opinions, and to certain comments of judges and counsel gleaned from transcripts of previous oral arguments.

Of course, it is not true that Standard's "good faith" has heretofore been "documented" or "acknowledged." There has been no previous findings, and no previous determination, on this issue either by the trial examiner, by the Commission, or by this Court.

The trial examiner and the Commission both were originally of the opinion that the decision of this case depended upon evidence of substantial injury to competition, and that the 2(b) proviso did not afford a defense in any case where such injury was affirmatively shown. Relying upon this construction of the statute, both the examiner and the Commission expressly found it unecessary to make findings on the issue of good faith.

The trial examiner twice carefully posed the question whether Standard's differentials granted the four jobbers were "made in good faith" to meet equally low prices of competitors (R. 5093, 5099), and each time as carefully omitted any finding of good faith in answering these ques-

tions (R. 5096, 5104). In view of the care and detail exhibited by the examiner's findings as a whole, his failure to conclude that the lower prices were made in good faith was clearly deliberate.

The examiner found, as the Commission has found now, that following the enactment of the Robinson-Patman amendment Standard's recognition of the three wholesalers as jobbers without regard to retail resales "was continued without inquiry into the question of any possible infraction of the law" (R. 5097-8).

Further, it should be noted that under the Commission's Rules in effect when this case was tried the trial examiner's findings were advisory only. Such findings then did not have the effect of an initial decision, as is now the case under the Administrative Procedure Act.

In any event, the examiner's findings, the 1949 opinion of the Court of Appeals, and all of the off-the-record comments and remarks relied on by Standard, including this Court's own remarks, were before this Court when it decided to remand. If this Court had considered the evidence to be conclusive as to Standard's good faith, it need not have remanded for further findings. In that case the Court could and no doubt would have directed final disposition of the case to avoid further delay.

In *Federal Trade Comm.* v. *Curtis Publishing Co.*, 260 U. S. 568, 580 (1923), this Court said:

> "But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony, and proceedings, a decree affirming, modifying, or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the

matter may be and ordinarily, we think should be remanded to the commission—the primary fact-finding body—with direction to make additional findings, but if, from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do."

See also: *Kidder Oil Co.* v. *F.T.C.*, 117 F. 2d 892, 896 (7th Cir.).

III

Standard's objections to paragraph 2 of the Commission's order are without merit. Retention of that paragraph or its equivalent is essential to the effectiveness of the order.

Standard sells its branded gasoline at tank car prices to three wholesalers in the Detroit metropolitan area each of whom resells to from fifteen to sixty retail gasoline service stations in that area. The price at which these wholesalers resell is normally the posted tank wagon price of their supplier. They make deliveries by tank truck to their customers' service station tanks in the same manner that deliveries are made by Standard to its retailer customers.

Standard also sells its branded gasolines at its posted tank wagon price by tank truck delivery to some 350 retail service station operators in the Detroit area, who are engaged in competition with the tank wagon customers of the wholesalers.

This record shows without dispute that at the time this case was tried the wholsaler's price differential was sufficient to enable wholesalers buying in tank car quantities to resell at a profit to their retailer customers, or to some of them, at prices lower than Standard's tank wagon price.

The best, but not the only, evidence of this is the fact that the largest of the wholesalers, Citrin-Kolb Oil Company, actually did so. Citrin-Kolb from 1936 to 1941 sold a million gallons of Standard's gasoline a year to the operator of a chain of five retail service stations in Detroit, delivered at the stations, at a cent a gallon below Standard's tank wagon price. The general manager of Citrin-Kolb Oil Company testified that "the only expense involved is the hauling and we can make money at hauling gasoline for a half a cent a gallon" (R. 1878-9). Citrin-Kolb Oil Company also gave a rebate of ½ cent a gallon off the posted tank wagon price to at least one other service station in Detroit during the period covered by the testimony in this case (Comm. Ex. 33, R. 4733).

We have shown at pages 15 and 16 of this brief that Standard's tank wagon customers are not at liberty to buy Standard's branded gasolines from wholesalers even if a wholesaler should offer them a price below Standard's tank wagon price. *All of these 350 dealers are prevented either by means of short term leases or by contracts from purchasing from wholesalers, and Standard does not permit them to purchase in tank car quantities at tank car prices.* In this situation, if a wholesalers passes along a part of his wholesale margin to certain of his retailer customers, selling to them below the price paid by Standard's direct retailer customers, the resulting competitive injury is the same as if the favored customers of the wholesaler purchased directly from Standard at the discriminatory price.

Section 2(a) of the Clayton Act prohibits discriminations in price in interstate commerce between purchasers of goods of like grade and quality, sold for resale, where the effect of the discrimination may be "to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, *or with customers of either of them*". The Commission

has found that Standard's discrimination in price to Citrin-Kolb Oil Company had the effect of substantially lessening competition and injuring, destroying and preventing competition between the favored customers of Citrin-Kolb and other gasoline retailers. Upon the state of facts above outlined, this finding cannot be challenged, and Standard has not heretofore challenged it. Apart from its general defense of meeting competition, its objections to paragraph 2 of the Commission's order go only to the terms of that paragraph and amount at most to a plea for modification.

Paragraph 2 of the present order is the equivalent of paragraph 6 of the Commission's prior order as modified and affirmed by the court below in 1949. The effect of the two paragraphs is the same, the difference in terminology being only one of emphasis. Both the old and new paragraphs offer Standard the same alternatives for compliance. Under either paragraph Standard might (1) discontinue selling to wholesalers and retailers in the same area at different prices, a practice which its two largest competitors in Detroit do not engage in; (2) narrow the differential between its wholesaler and retailer prices in such areas to the point where the differential can be cost justified; (3) reduce its tank wagon price when necessary to eliminate discrimination between its own retailer customers and those of its wholesalers; or (4) exercise its right to choose its customers by refusing to sell to a wholesaler *known* to be passing along part of its price differential to retailers competing with Standard's own retailer customers.

In the court below Standard made the same objections to paragraph 2 which it previouly raised here as to old paragraph 6. Its argument was, and still is, that this paragraph of the order would require resale price maintenance. The court below summarily dismissed this contention in 1949, and it has no more vitality now. As that court pointed out:

> "The petitioner does not have to make price control agreements with anyone. It has only to govern its own conduct to avoid the impact of an unlawful discrimination" (R. 5301);

Standard says that it should not have to be concerned with the prices at which its wholesalers resell because it cannot control those prices. It might as well argue that it should not have to be concerned with whether its jobber customers resell at retail because it cannot control the manner in which they resell.

Although paragraph 6 of the former order was the subject of some discussion in the briefs and argument in this Court in 1950, this Court in its opinion did not mention paragraph 6. If it had disapproved of this paragraph in substance or in terms it would almost certainly have made appropriate comment for the guidance of the Commission upon remand. The minority opinion suggested only that in the event of affirmance they *might* have concluded that "some amendment might be required in the wording of the order". If it be inferred that this reference was directed to paragraph 6, still there is no suggestion whatever that that paragraph was not approved in substance.

There is nothing startling about prohibiting a supplier from selling to wholesalers and retailers in the same sales area at a differential so great as to enable the wholesalers to undersell their supplier, where the retailer customers of the supplier cannot buy from wholesalers but are in direct competition with the wholesaler's customers. If the order did not include such a prohibition there would be nothing to prevent Ned's Auto Supply Company from transferring its business to Citrin-Kolb at a cent or more a gallon below the tank wagon price, delivered at Ned's stations. Ned's would obtain substantially the same competitive advantage over other retailers which it has obtained by purchasing in tank car quantities from Standard.

Standard would achieve the same result which it now obtains, merely using Citrin-Kolb as a conduit for sales to Ned's.

Contentions made by jobbers

Briefs filed in the court below by two jobber associations and by Citrin-Kolb Oil Company asserted that paragraph 2 of the Commission's order would place restrictions on them which they cannot accept "and still compete with other jobbers not similarly restricted".

Standard's three wholesalers, Citrin-Kolb, Wayne and Stikeman, supply about 100 service station customers in Detroit. The evidence is that except in only two instances (where Citrin-Kolb passed along part of its wholesale margin), each of these wholesalers has always resold to these retailer customers at Standard's tank wagon price. These 100 retailers, and the wholesalers as their suppliers, will be protected by the Commission's order against the injurious effects of Standard's price discrimination along with the 350 retailers purchasing direct from Standard. There is no evidence that any one of the three wholesalers ever lost a retailer customer through an offer of a lower price by a wholesaler of another major brand. Neither does it appear in the two instances where Citrin-Kolb resold to retailers at below the tank wagon price that it did so to meet such competition.

Another argument made by the jobbers is that enforcement of this order would simply result in these jobbers transferring their business to other suppliers at the same or lower prices, at some expense to themselves and loss to Standard, without any offsetting benefit to Standard's tank wagon customers. It is stated that they would still be able to buy "at the jobber price" from Michigan refiners or from some supplier selling only to tank car buyers in Detroit. This conjectured result does not find support in the facts of record.

The Michigan gasoline referred to is non-major or "off brand" gasoline which sells at a lower price, obviously has little public acceptance, and is a minor competitive factor. As to the claim that some suppliers sell exclusively to tank car buyers, the record shows no instance of a major oil company engaging in such operation in Detroit or other metropolitan areas. Standard's two largest competitors in Detroit (Sun and Socony-Vacuum) do not sell to jobbers.

It should not be forgotten that wholesaler associations were the principal lobbyists for the passage of the Robinson-Patman Act which was primarily directed against just the type of continuing preferential discounts to chains and other large buyers which the major oil companies have been granting here. The only wholesalers who might be adversely affected by this order are those who have been using their jobber price differential to gain an unfair competitive advantage in reselling at retail, or to discriminate among their own customers with the same result.

CONCLUSION

The judgment of the Court of Appeals should be reversed, with direction that a decree be entered affirming and enforcing the order of the Federal Trade Commission.

Respectfully submitted,

APPELL, AUSTIN & GAY,
Attorneys for National Congress of Petroleum Retailers, Inc. and Retail Gasoline Dealers Association of Michigan, Inc.

CYRUS AUSTIN,
Of Counsel.

APPENDIX

Affiliated Member Associations
National Congress of Petroleum Retailers—1957

Arizona	Arizona Gasoline Retailers Association 3341 N. 16th Street Phoenix, Arizona
	Tucson Service Station Operators Association, Inc. 1500 E. Broadway Tucson, Arizona
California	California Gasoline Retailers 1589 N. Fruit Avenue. Fresno, California
Colorado	Petroleum Retailers Association of Colorado 2402 Curtis, Room 207 Denver, Colorado
Delaware	Delaware Gasoline Dealers Association 903 Delaware Avenue Wilmington, Delaware
Dist. of Columbia	Metropolitan Retail Gasoline Dealers Ass'n., Inc. 5200 New Hampshire Avenue, N. W. Washington 11, D. C.
Florida	Allied Gasoline Retailers Association of Florida 208 Guaranty Life Building Jacksonville, Florida
Georgia	Georgia Association of Petroleum Retailers, Inc. 551 E. College Avenue Decatur, Georgia

Idaho	Petroleum Retailers of Greater Idaho, Inc. P. O. Box 2253 Boise, Idaho
Illinois	Illinois Retail Gasoline Dealers Ass'n., Inc. 8 N. Ogden Avenue Chicago 7, Illinois
	Gasoline Retailers Association of Metropolitan Chicago 8 N. Ogden Avenue Chicago, Illinois
	Central Illinois Gasoline Dealers Association Carpenters Bldg., 234 N. Madison Avenue Peoria, Illinois
Indiana	Gasoline Retailers of Indiana P. O. Box 241 Fort Wayne, Indiana
	Gasoline Retailers of Greater Indianapolis, Inc. 917 Circle Tower Building Indianapolis, Indiana
Iowa	Iowa Petroleum Retailers Association 316 Walnut Street Des Moines, Iowa
Kentucky	Kentucky Gasoline Dealers Association, Inc. 200 W. Main Street Louisville, Kentucky
Louisiana	Louisiana Petroleum Retail Dealers, Inc. 3915 Gilbert, P. O. Box 3631 Shreveport, Louisiana

Maryland	Independent Gasoline Dealers Ass'n. of Maryland 7517 Marston Road Baltimore 7, Maryland
Massachusetts	Retail Gasoline Dealers Ass'n. of Massachusetts, Inc. 1105 Commonwealth Avenue Boston 15, Massachusetts
Michigan	Retail Gasoline Dealers Ass'n of Michigan, Inc. 325 Farwell Building Detroit 26, Michigan
Minnesota	Northwest Retail Gasoline and Service Ass'n. 1821 University Avenue St. Paul, Minnesota
Minnesota and North Dakota	Cass-Clay Retail Gasoline Dealers Association 922 Center Avenue Moorhead, Minnesota
Missouri	Associated Petroleum Retailers of Greater St. Louis 6223 Juniata Street St. Louis 9, Missouri
Montana	Gallatin Petroleum Dealers Association 136 W. Main Street Bozeman, Montana
Nevada	Nevada Association of Petroleum Retailers 201 E. 4th Street Reno, Nevada
New Hampshire and Vermont	Gasoline Retail Dealers Ass'n of New Hampshire, Inc. 653 Main Street, Masonic Temple Bldg. Laconia, New Hampshire

New Mexico	New Mexico Service Station Association P. O. Box 422 Albuquerque, New Mexico
New York	Gasoline Merchants of Brookiyn, Inc. 1640 Eastern Parkway Brooklyn 33, New York
	Buffalo and Suburban Gasoline Retailers Ass'n. 405 S. Union Road Williamsville 21, New York
	Suffolk County Gasoline Retailers Ass'n., Inc. 38 Oakdale Avenue Central Islip, New York
	Retail Gasoline Dealers Ass'n. of Monroe County 130 Franklin Square Rochester 5, New York
	Niagara Falls Gasoline Dealers Association 770 Main Street Niagara Falls, New York
	Inter-City Gasoline Dealers Association 101 Cedar Street New York 6, New York
North Carolina	North Carolina Service Station Association 2514 Farthing Street Durham, North Carolina
Ohio	Ohio Gasoline Dealers Association 970 Spitzer Building Toledo 4, Ohio

Ohio

Summit County Gasoline Dealers Ass'n., Inc.
229 Madison Avenue
Akron 20, Ohio

Independent Gasoline Dealers, Inc.
2319 McGuffey Road
Youngstown, Ohio

Ashland County Gasoline Dealers Association
141 Clarimont Avenue
Ashland, Ohio

Stark County Gasoline Dealers Association
624 S. Main Street
N. Canton, Ohio

Central Ohio Gasoline Dealers Association
1738 Ashland Avenue
Columbus 12, Ohio

Muskegum Gasoline Dealers Association
530 Commissioner Street
Zanesville, Ohio

Northwestern Ohio Gasoline Dealers Association
970 Spitzer Building
Toledo 4, Ohio

Greater Cincinnati Gasoline Dealers Association
785 Clanora Drive
Cincinnati 5, Ohio

Cleveland Independent Gasoline Dealers Ass'n. Inc.
4730 Woodland Avenue
Cleveland, Ohio

Oklahoma	Oklahoma Gasoline Retailers Association, Inc. 208 Wright Building Annex Tulsa 3, Oklahoma
Oregon	Portland Automotive Trades Association 1832 S. W. 11th Street Portland 1, Oregon
Pennsylvania	Associated Retail Gasoline Dealers, Inc. 5991 Center Avenue Pittsburgh 6, Pennsylvania
South Dakota	Gasoline Retailers Association of Sioux Falls P. O. Box 396 Sioux Falls, South Dakota
Tennessee	Tennessee Service Station Association, Inc. 308 Cherokee Building, P. O. Box 303 Knoxville, Tennessee
Texas	Texas Service Stations Associated 1509 Guadalupe Austin, Texas
Utah	Utah Association of Petroleum Retailers 202 Crandall Building, P. O. Box 1251 Salt Lake City, Utah
Virginia	Virginia Gasoline Retailers Association, Inc. Peoples Federal Building Roanoke, Virginia
	Roanoke Valley Retail Gasoline Dealers Ass'n. Peoples Federal Building Roanoke, Virginia

Virginia	Tidewater Independent Gasoline Dealers Ass'n. 3119 Elm Avenue, P. O. Box 707 Portsmouth, Virginia
Washington	Washington Gasoline Dealers Association, Inc. 127 Mercer Street Seattle 9, Washington
West Virginia	West Virginia Gasoline Retail Dealers Ass'n., Inc. 1100 Fairmont Avenue Fairmont, West Virginia
Wisconsin	Retail Gasoline Dealers Ass'n. of Wisconsin, Inc. Route #3 Lake Geneva, Wisconsin